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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

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No. 76-1851

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THOMAS ALLEN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

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## REPLY BRIEF FOR PETITIONER

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We show below that the Government's opposition to the first question presented by petitioner is unwarranted, and its opposition to the second question is completely unresponsive.

### I. FIRST QUESTION.

A. The Government asserts that Allen's defense before the jury was inconsistent with a plea of diminished capacity or insanity and then infers that because trial counsel chose to defend on the merits, he also "chose" to

"reject" the available defense of diminished capacity and insanity (Opp. 2, 6, 8). Both the assertion and the inference therefrom are unwarranted.[1]

Allen did not plead alibi or otherwise deny the existence of the transactions alleged in the indictment. He contended that the transactions were made by him in good faith and at arms length, that he was under no obligation to disclose to his customers facts that the Government contended were material, and that there was no "scheme" to defraud. (Pet. 4 & n.13.) Evidence showing that Allen was hospitalized and undergoing electroshock treatments at the times that these transactions occurred and that his mental capacity was diminished would have tended to confirm that Allen was acting in good faith and was not implementing a scheme to defraud. Thus, the diminished capacity or insanity defense, if properly investigated and raised, would have bolstered, rather than undercut Allen's denial of a scheme to defraud and his defense of good faith. In addition, it would have provided an independent and admittedly substantial defense (Pet. App. 8a).

Having erected a hypothetical inconsistency between available defenses, the Government infers not only that trial counsel "chose" to defend on the merits, but also "chose" in some responsible way to "reject" the available defenses of diminished capacity and insanity (Opp. 6, 8). The Government, however, offers no record citation to support its assertion that defense counsel reasonably investigated and then weighed the supposedly inconsistent defenses,[2] defense counsel's statements are inconsistent

[1] The Government has lodged with the Clerk a copy of the brief it filed in the Tenth Circuit. In like vein, we are lodging the briefs filed by Allen in the Tenth Circuit. We note that Allen's reply brief in the court below takes issue with many assertions of fact and inferences made by the Government in its brief in the court below.

[2] The record shows that approximately four months before trial, the trial court admonished trial counsel to report on Allen's competency to stand trial—an issue obliquely raised by defense counsel's motion to continue the date for a hearing because Allen was physically and mentally unable to attend a hearing (Pet. 7 n.4). The trial court noted that "I've had a little trouble up to this point in getting the attention of the defense" (*id.*). On or after September 6, 1974, defense counsel obtained a letter from Allen's doctor relating to Allen's competency (Pet. 8 n.5). The letter mentions that Allen was hospitalized twice in 1970 and once in 1971, but does not indicate the length of these confinements or the nature of the treatment (Pet. 9 n.8). Shortly thereafter, Allen's counsel underwent surgery and was incapacitated from October 11, 1974, to January 1, 1975 (Pet. 8 n.6). Five days thereafter Allen's lengthy trial began (Pet. 4). The diminished capacity and insanity defenses were not raised. After trial, Allen's counsel stated that "I had not realized until I saw the report of the doctor [submitted by the Probation Office in conjunction with sentencing] the seriousness of this matter and what the situation actually was with reference to Mr. Allen's health" (Pet. 5). Counsel also said that "had I known" my judgment would have been to try the case "on an entirely different basis" but "we were not aware of the situation detailed in the doctor's [post-trial] report . . ." (*id.*).



with this notion, and indeed prove the opposite, and neither the trial court nor the court of appeals found or suggested that defense counsel, after reasonable investigation, made a tactical decision to reject available defenses.

B. The Government states that the Tenth Circuit applied a farce and mockery standard (Opp. 5). While that standard is less favorable than the reasonable competence standard applied in some circuits, the Government asserts that "this case presents no occasion for the resolution of whatever differences may exist among the courts of appeals . . ." because "the trial record here convincingly demonstrates that the performance of petitioner's counsel was well 'within the range of competence demanded of attorneys in criminal cases.' " (Opp. 5). One might reasonably expect that such a sweeping assurance by the United States would be accompanied by record citations, a statement that one or more of the attorneys appearing on the opposition had read the record of the lengthy trial, or, at a minimum, some reasoning or explanation to support the assurance. None is tendered.

In any event, this Court sits to review rulings of law made by courts of appeals on the basis of the facts set forth in the court of appeals' opinion and any findings that may have been made by the district court. In this case, neither of the lower courts applied a reasonable competence standard, neither court found or alluded to facts that tended to support a conclusion that Allen's representation satisfied a reasonable competence standard, and neither court expressed confidence or satisfaction in the manner which Allen was represented at trial. The reasons stated by the lower courts in support of their rulings undermine the assertion that trial counsel's performance met a standard of reasonable competence. The trial court refused to grant a new trial because the evidence supporting the diminished capacity and insanity defenses "should have been discovered prior to trial through the exercise of due diligence" (Pet. App. 27a).[3] The court of appeals affirmed because granting a new trial "would put a premium on neglect and would encourage a strategy of not making use of available information, with the thought that later 'discovery' might be the basis for a new trial. . . ." (Pet. App. 11a).

C. Petitioner urged that the above quoted language of the Tenth Circuit shows it applied a new standard that is even more stringent than the "farce and mockery" standard. The Government's response is enigmatic (Opp. 5). It contends that "contrary to petitioner's assertion the court's language suggests not that it was applying a new, more stringent standard . . . but rather that it was legitimately concerned that defense lawyers might deliberately avoid presenting a defense at trial in the hope that the omission might be raised, if necessary, in a motion for a new trial or on appeal" (Opp. 5). We agree

[3] The district court found that trial counsel's failure to file a notice of appeal on behalf of co-defendant Central (Allen's wholly-owned corporation) was due to neglect (Pet. 5).



that this was one of two "concerns" expressed by the court—the other being a concern that "neglect" of counsel not be rewarded with a "premium." Indeed, these were the only two "concerns" or reasons advanced by the court in support of its ultimate conclusion that Allen should be denied relief. These concerns were not tied to the facts of this case but evidently were grounded in a theory of deterrence. The record is devoid of evidence suggesting that trial counsel in this case were engaging in a strategy of withholding a defense for later use. The Government points to no evidence suggesting that, nor did the court of appeals. In a legal system that is responsive to stare decisis, the "concerns" or reasons stated by the Tenth Circuit in this case presumably will serve as the standard for other cases where a claim of ineffective assistance of counsel is rooted in the failure of trial counsel reasonably to investigate and present a substantial defense available to the defendant. The new standard would authorize the denial of a new trial in cases where it has traditionally been deemed to be most deserved; for the court's "premium on neglect" rationale clearly authorizes lower courts to deny the victimized client a new trial because of his attorney's neglect, no matter how gross.

## II. SECOND QUESTION.

The Government has managed to misconstrue entirely petitioner's second argument and, accordingly, has not replied to it at all. The misconstruction begins with the Government's statement of the issue: "Whether, in the circumstances of this case, the government was *required to prove* that petitioner had a fiduciary relationship with the victims of his mail fraud scheme." (Opp. 2; emphasis added.) That issue was raised below, but was not presented to this Court as a basis for granting review. The issue presented here is not whether the Government

was required to prove fiduciary duty, but whether the presence or absence of fiduciary duty was *relevant* to the mail fraud charges and central to petitioner's theory of the defense. Petitioner contends that the district court erred in instructing the jury that presence or absence of fiduciary duty was *irrelevant*.

The misconstruction extends to the Government's opening statement of petitioner's objection. Petitioner does *not*, contrary to the Government's assertion (Opp. 8), object "to the district court's instruction to the jury that the government was not required to prove, as an element of the crime of mail fraud, that a fiduciary relationship existed between petitioner and his customer." The instruction at issue is quoted at pages 17-18 of the Petition. Simple inspection demonstrates that it is not an instruction about the Government's burden of proof, but an instruction about what is relevant to guilt or innocence.

Finally, petitioner does not claim, as the Government states, "that the alleged non-disclosures in counts I-VIII could not have been fraudulent in the absence of a fiduciary relationship" (Opp. 8). The petition does not quarrel with the statement of the court of appeals that the Government introduced proof of affirmative misrepresentations tending to support the Government's theory of the case on counts IV, VI, and VIII. That statement is true but irrelevant, unless the Government is offering the novel theory that so long as the Government meets its burden of proof, there is no duty for the court to instruct the jury on the defendant's theory of the case. There is, of course, such a duty, long recognized by this Court. See Petition at 19. By instructing that fiduciary duty was irrelevant, the court deprived Allen of a substantial aspect of his defense. The Government misunderstands the argument and has offered no justification for condoning the result below.



## CONCLUSION

For the reasons presented in the petition, a writ of certiorari should be issued to review the judgment of the Tenth Circuit.

Respectfully submitted,

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